Supreme Court, U.S.
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No. 05-390

In The
Supreme Court of the United States

THERON M. McCLAIN,

Petitioner,

v.

RETAIL FOOD EMPLOYERS JOINT PENSION PLAN AND BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does ERISA require that for purposes of calculating the pension amount, all years of pre-ERISA participation in the plan must be credited, regardless of breaks in service, unless a break is equal to or longer than the period of participation before the break?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Barker, D.J.) granting respondents' motion to dismiss the Amended Complaint (which was treated by the Court as a motion for summary judgment) is unpublished (S.D. Ind. Aug. 9th, 2004). (Appendix App. 10).

The Court of Appeals' opinion (Manion, J., joined by Rovner and Sikes, JJ) affirming (App. 1) is published at 413 F.3d 582 (CA7 2005).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on June 27, 2005. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are sections of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*, *as in effect in 1976* (although those provisions were amended since that time, they

remain substantially the same). The 1976 provisions involved are reprinted in the Appendix at App. 24.

STATEMENT OF THE CASE

Petitioner, is a retired participant in Defendant, Retail Food Employers Joint Pension Plan, a multi-employer defined benefit pension plan from which he receives a pension. Although he worked in covered employment under the Plan for a total of 27 years, his pension is based only on his last 11 years of service. The Plan disregarded his prior 16 years of service due to a pre-ERISA break in service.

It is undisputed that ERISA permits a plan to enforce its pre-ERISA break in service provisions for vesting purposes, but that there is no similar provision governing accrual. On the contrary, ERISA provides that, for accrual purposes, all years of service during plan participation must be taken into account, unless the break in service, whether pre- or post-ERISA, is as long or longer than the period of service before the break. This ERISA provision is referred to as the "rule of parity."

In short, it is undisputed that a participant who suffers a pre-ERISA break in service under the terms of a pre-ERISA plan, loses all credited service for *vesting* purposes. The issue presented by this Petition is whether those years must be credited for *accrual* purposes (a) if the participant accumulates enough post-break years of service to vest under ERISA; and (b) if the number of his pre-break years of service is greater than his break years. In other words, the issue is whether ERISA's "rule of

parity" applies for accrual purposes to pre-ERISA service where a participant vests post-ERISA.

In the case at bar the Seventh Circuit, following its earlier decision in *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994), decided that issue against the participant, Petitioner herein. Yet, the identical issue was decided in favor of the participant in the Second and Third Circuits in *McDonald v. NYSA-ILA Pension Plan*, 320 F.3d 151 (2d Cir. 2003), and *DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220 (3rd Cir. 2005), and by a district court in the Eleventh Circuit in *Hoover v. Bank of America Corp.*, 2003 WL 22300499 (MD Fla., Sept. 24, 2003), *aff'd*, 127 Fed. Appx. 470, 2005 WL 80957 (11th Cir., Jan. 5, 2005) (text).

Pre-ERISA plans provided for a loss of all credited service, regardless of its length, after a break in service as short as one year or less. Thus, countless workers in the construction and other cyclical industries are vitally affected, as well as countless women whose early service was broken for child-birth or child-rearing, but who returned to covered employment post-ERISA. As a consequence, although the issue presented involves a pre-ERISA break in service, it is not a historical curiosity, but continues to recur at present, as shown in the above cases, and will continue to recur for the foreseeable future.

Plaintiff is a resident of West Terre Haute, Indiana. He was employed at National Tea Company from March 1957 to March 1973, and by Grace Foods from April 1, 1984 to April 1993. During those two periods of service both companies contributed to the Plan on his behalf. (From March 1973 to April 1984, Plaintiff was employed

outside the retail food industry and, therefore, was not an active participant in the Plan.)

At the time Plaintiff terminated his employment with Grace Foods in April 1993, he began receiving pension benefits from the Plan, but only in an amount based on his employment with Grace Foods. He has not, and does not receive benefits based on contributions made on his behalf during his pre-break in service employment.

ERISA Section 204(b)(3)(A), 29 U.S.C. §1054(b)(3)(A) (1976), states, in pertinent part, that in determining an employee's accrued benefit, all his years of participation are to be taken into account, beginning at the earliest date on which the employee was a participant in the plan, except for a period of service excluded by ERISA Section 202(b), 29 U.S.C. §1052(b). ERISA Section 202(b) excludes only years of participation lost due to a permanent break in service, that is, a break in service whose length is greater than the number of years of participation accrued before the break (the "rule of parity").

Plaintiff's break in service lasted from March 1973 to April 1984, which is a period that is shorter than his years of participation (March 1957 to March 1973) before the break in service.

The basis of jurisdiction in the District Court is ERISA §502, 29 U.S.C. §1132.[1]

REASONS FOR GRANTING THE WRIT

CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS, THEREBY PRODUCING INCONSISTENT RESULTS FOR PARTICIPANTS IN NATIONAL PLANS AND CREATING CONFLICTING DUTIES FOR PLAN ADMINISTRATORS. FURTHERMORE, THE DECISION BELOW IS INCONSISTENT WITH THE INTERNAL REVENUE SERVICE REGULATIONS

Congress enacted ERISA because employee benefit plans were becoming increasingly interstate and there was a need for a uniform body of law. ERISA §2(a), 29 U.S.C. §1001(a). To promote uniformity, ERISA contains one of the most comprehensive preemption provisions in federal law. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) ("Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law.").

The split among the circuits in interpreting ERISA with regard to the issue of creditable service for accrual

[1] Petitioner has brought this action on his own behalf, and on behalf of a Class of similarly situated participants, beneficiaries and their Estates, pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The District Court deferred consideration of the issue of class certification by agreement of the parties, pending resolution of the motion to dismiss. This motion was converted by the Court to a motion for summary judgment.

purposes undercuts this purpose. As the law now stands, Petitioner, who happened to live in the Seventh Circuit cannot receive pension benefits for 16 years of pre-ERISA service, while he would be credited with those years if he were lucky enough to live in the Second, Third, or Eleventh Circuits. Thus, participants in the same, or same type of, plan with the same fact pattern would have been entitled to drastically different pensions but only because of where they reside.

This disparity is not just an issue of confusion and inequity for plan participants. It creates great uncertainty for the employee benefit plans themselves. ERISA has a very liberal venue provision. ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), permits a plan to be sued "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." As a consequence, when calculating pension benefits, a plan must not only consider the plan's benefit formula, but also consider the impact of all possible venues. Indeed, any participant similarly situated to Petitioner will make sure to bring his action in the Second, Third, or Eleventh Circuits, shunning the Seventh.

In sum, because of the split among the circuits, the benefits to be paid to some participants will be determined by one method, and the benefits to be paid to others in the same type of plan will be determined by another method. A participant's pension rights should be dependent on the governing documents and on a consistent interpretation of ERISA, not on the mere happenstance of venue. It is this Court's task to insure the uniform interpretation of ERISA generally, and particularly ERISA's provisions affecting benefits.

Finally, the Internal Revenue Service, the federal agency entrusted with interpretative and regulatory responsibility regarding ERISA's minimum standards, including the statutory provisions at issue here, supports the Second Circuit's holding. *See* Letter from Mary Joe White, United States Attorney, U.S. Department of Justice, dated February 14, 2001, to Hon. Naomi Reice Buchwald. As stated in the letter, "[t]his letter conveys the views of the Office of Chief Counsel of the Internal Revenue Service (the "IRS"), which is vested with interpretive authority over the regulations relevant to the issue framed by the Court." (App. 49).

> "It is the IRS' position that all years of service should be taken into account to determine an employee's accrued benefit, including years of service both before and after ERISA's effective date of September 2, 1974, except for years of service specifically mentioned in Section 410(a)(5) and Section 411(b)(4)(A) of the Internal Revenue Code (the "IRC"). 26 U.S.C. §§410(a)(5), 411(b)(4)(A)."

The sections cited by the IRS are the IRC analogues to ERISA Sections 202(b)(4) and 204(b)(3)(A) (1976), now numbered 202(b)(4)(A) and 204(b)(4)(A), respectively, 29 U.S.C. §§1052(b)(4)(A) and 1054(b)(4)(A). The IRS' views, as expressed in its letter, are based upon its own Regulations governing the statutory provisions at issue, as more fully set forth in the letter itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
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for the Seventh Circuit

No. 04-3360

THERON M. MCCLAIN,

Plaintiff-Appellant,

v.

RETAIL FOOD EMPLOYERS JOINT PENSION PLAN and BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 03 C 403 – **Sarah Evans Barker, *Judge.***

ARGUED APRIL 7, 2005 – DECIDED JUNE 27, 2005

Before MANION, ROVNER, and SYKES, Circuit Judges.

MANION, *Circuit Judge*. The Retail Food Employers Joint Pension Plan denied Theron McClain pension benefits. McClain sued the Plan and its board of trustees (collectively, "the Plan") under the Employee Retirement Income Security Act ("ERISA"). McClain specifically alleged that the Plan violated ERISA's standard for handling accrued benefits. The district court granted

summary judgment for the Plan. McClain appeals. We affirm.

McClain worked for the National Tea Company for sixteen years, from March 1957 to March 1973. During that period, he participated in the Plan. McClain left National Tea to manage his own retail food store, at which time he terminated his participation in the Plan. Eleven years later, however, McClain went to work for Grace Foods and again became a Plan participant. He continued to participate in the Plan from April 1984 until he left Grace Foods nine years later in April 1993.

At that juncture, McClain began receiving pension benefits from the Plan based upon his service at Grace Foods. In 2001, McClain applied for pension benefits for his time with National Tea,[1] but the Fund denied the application, finding that McClain did not qualify for benefits from the earlier period. According to the Plan, the pension benefits that McClain had accrued while at National Tea never vested because of McClain's break in service, i.e., the period between his two participation periods, and the corresponding contractual terms of the Plan.

Before further describing the Plan's denial, it is helpful to distinguish "accrued" from "vested" in this ERISA context. "[A]ccrued benefits refer to those normal retirement benefits that an employee has earned at any given time during the course of employment." *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 635 n.5 (7th Cir. 2004)

[1] The record and the briefs do not reveal why McClain, who left the Plan for good in 1993, waited until 2001 to submit his application pertaining to his National Tea employment.

(internal quotation omitted). By contrast, "[v]ested benefits . . . refer to those normal retirement benefits to which an employee has a nonforfeitable claim." *Id.* (internal quotation omitted). In short, an employee's vested benefits are the accrued benefits that the employee is actually "entitled to keep." *Id.* (internal quotation omitted).

McClain was denied benefits based upon § 4.4(e) of the Plan. Under the Plan, pension benefits are based upon an employee's "eligibility service," and McClain's time at National Tea qualified as "eligibility service." Nonetheless, pursuant to § 4.4(e), if an employee has a "break in service," all of the "eligibility service" that he accumulated before his break cannot "be counted for purposes of determining his eligibility for a pension benefit." For periods before January 1, 1976 (i.e., pre-ERISA), § 4.4(a) of the Plan defines a "break in service" as two consecutive calendar years in which the employee had failed to accumulate any "eligibility service." However, § 4.4(a) negates the ill effects of any such break on the employee if, before the defined break, the employee was "eligible for a pension benefit in accordance with the rules of the Plan then in effect."

Here, McClain had a defined "break in service" before 1976 because he did not accumulate any "eligibility service" during the two consecutive calendar years of 1974 and 1975. The matter then turns to whether McClain's pre-break benefits can be saved by § 4.4(a). The rules of the Plan in effect before McClain's defined 1974-1975 "break in service" – that is, the rules in effect in 1973 – come from the 1966 version of the Plan, as amended in 1972. Under § 5.5 of that version, an employee had to meet two key requirements to become eligible for a pension benefit: (1) his employment terminated on or after his

fiftieth birthday and (2) he completed ten or more years of service. Upon satisfaction of these conditions, benefits vested under the Plan. McClain was thirty-three in 1973 when he ended his sixteen years at National Tea. Therefore, while McClain met the second vesting condition, he did not satisfy the first. As a result, McClain's 1957-1973 accrued benefits did not vest before his "break in service," and, thus, pursuant to the pertinent Plan provisions, he was not entitled to pension benefits for the pre-break period.

This manner of disregarding service and denying benefits is consistent with ERISA § 203, 29 U.S.C. § 1053, which governs the vesting of benefits. In general, § 203(b)(1) requires a plan to count all of an employee's years of service for vesting purposes. However, so as not to disturb contractual arrangements in existence before ERISA, § 203(b)(1)(F) provides an exception to the general rule for pre-ERISA breaks in service. This exception allows a plan to disregard years of service before ERISA became applicable to the plan, here 1976, "if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." 29 U.S.C. § 1053(b)(1)(F). Simply put, the Plan here may disregard McClain's 1957-1973 service under § 203(b)(1)(F) because that service would have been disregarded under the applicable pre-ERISA rules of the Plan.

Acknowledging this roadblock, McClain did not bring his lawsuit[2] under § 203. Rather, he complains that the

[2] McClain has fashioned this suit as a class action, but, pursuant to an agreement between the parties, the district court adjudicated the Plan's summary judgment motion without making a class certification

(Continued on following page)

Plan's denial of benefits runs afoul of ERISA § 204, 29 U.S.C. § 1054, which covers accrued benefits. Similar to § 203's general rule, § 204 – particularly § 204(b)(4)(A) – requires a plan to credit all of an employee's years of service when determining the amount of the employee's accrued benefit. *See* 29 U.S.C. §§ 1054(b)(1)(D) & (b)(4)(A) (cross-referencing 29 U.S.C. §§ 1052(b)(1)-(4)). Nevertheless, unlike § 203, § 204 does not contain a parallel exception for McClain's situation; it is silent on pre-ERISA breaks in service. *See id.* McClain therefore reasons that, if, under § 204(b)(4)(A), all of his service must be counted, then the Plan must pay him pension benefits for his service with National Tea – irrespective of § 203(b)(1)(F). The Plan's failure to do so, argues McClain, violates § 204(b)(4)(A).

Under McClain's approach, there is a clear conflict between § 203 and § 204. Service that is permissibly disregarded under § 203 could not be disregarded under § 204. We squarely addressed and rejected such inconsistent treatment of pre-ERISA breaks in service in *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994). In interpreting these statutory provisions, we ruled in *Jones* that Congress did not intend § 204's silence on pre-ERISA breaks in service to "override" the explicit rules in § 203 for addressing such breaks. *Id.* at 143-44. Accordingly, we held that § 204 "should be read together with [§] 203" and should not

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ruling. Given the dispositive ruling at hand and the fact that the district court did not reserve the certification issue for future determination, the absence of a class certification ruling does not affect our jurisdiction under 28 U.S.C. § 1291. *See Harold Wash. Party v. Cook County, Ill. Democratic Party*, 984 F.2d 875, 878-79 (7th Cir. 1993). The lack of a certification ruling merely means that the scope of the district court's judgment is limited to this particular plaintiff. *See id.*

"defeat break in service provisions in plans adopted before ERISA" existed. *Id.* at 144. The upshot is that, if a plan was contractually able to disregard an employee's pre-break service before ERISA became applicable, ERISA should not and does not retroactively upset the plan's pre-ERISA framework and award unanticipated benefits to the employee. *See id.* at 143-44. Based upon *Jones*, the district court granted the Plan summary judgment.

Under *Jones* then, we must analyze McClain's § 204 claim in conjunction with § 203. Specifically, § 204(b)(4)(D) must be read together with the pre-ERISA break in service exception of § 203(b)(1)(F). As already discussed above, § 203(b)(1)(F) permits the Plan to disregard McClain's 1957-1973 service since that service would have been disregarded under the applicable pre-ERISA rules of the Plan. Therefore, pursuant to *Jones* and § 203(b)(1)(F), the Plan's denial of benefits did not violate § 204(b)(4)(A) as alleged by McClain.

McClain, nevertheless, seeks to have us overturn *Jones*. We require a compelling reason to overturn circuit precedent. *See Debs v. N.E. Ill. Univ.*, 153 F.3d 390, 394 (7th Cir. 1998) (citing *Mid-Am. Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1364 (7th Cir. 1996)). Furthermore, "principles of *stare decisis* require that we 'give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling.'" *Haas v. Abrahamson*, 910 F.2d 384, 393 (7th Cir. 1990) (quoting *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987)); *see also Debs*, 153 F.3d at 394. Here, there has been no such decision by a higher court or a statutory overruling.

McClain attempts to meet the compelling reason standard with two other arguments. First, he points to *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 156-59 (2d Cir. 2003), in which the Second Circuit declined to follow *Jones*.[3] According to *McDonald* and McClain, Congress intended accrued and vested benefits to be treated differently. *Id.* at 159. *McDonald* posited that "had Congress intended to permit pre-ERISA break-in-service provisions to apply when calculating accrued benefits, it could have done so." *Id.* That is a fair point, but, with due respect, we find it unpersuasive. As discussed above, if § 203 and § 204 are not read together in the present situation, service that is permissibly disregarded under § 203 could not be disregarded under § 204. As we reasoned in *Jones*, Congress could not have intended such a result. 16 F.3d at 143-44. Section § 203(b)(1)(F) demonstrates clear congressional intent to have pre-ERISA contractual relationships regarding breaks in service continue after ERISA's enactment and, thus, under § 203(b)(1)(F), certain service may be disregarded. *See id.* To respect and effectuate this congressional intent, § 204(b)(4)(A) and § 203(b)(1)(F) should be read together. Moreover, "[i]t is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative[,]' " superfluous, or meaningless. *Jenkins v. Heintz*, 124 F.3d 824, 833 (7th Cir.

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[3] *McDonald* is the only circuit opinion since *Jones* to address the issue. As observed in *Jones* and *McDonald*, the Third and Eighth Circuits have, like *Jones*, read § 204 and § 203 together. *See Jones*, 16 F.3d at 143 (citing *Jameson v. Bethlehem Steel Corp.*, 634 F. Supp. 688 (E.D. Pa.), *aff'd without opinion*, 802 F.2d 447 (3d Cir. 1986); *Redmond v. Burlington N. R.R. Co. Pension Plan*, 821 F.2d 461 (8th Cir. 1987)); *see also McDonald*, 320 F.3d at 159.

1998) (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340-41 (1994)); *see also In re Scott*, 172 F.3d 959, 969 (7th Cir. 1999). So that the explicit break in service exception in § 203 should be read to have meaning and effect, § 204(b)(4)(A) should not be interpreted in a way that would override § 203(b)(1)(F). The reasoning in *Jones* is sound, and we reaffirm it here.

Second, McClain cites a Labor Department regulation about accrual rules to support his position, contending that the regulation should be afforded deference in accordance with *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The regulation at issue is 29 C.F.R. § 2530.204-2(b). This regulation, like § 204(b)(4)(A), generally provides that all of an employee's service should be taken into account for accrual purposes under § 204. *See* 29 C.F.R. § 2530.204-2(b); *see also* 26 C.F.R. § 1.411(b)-1(c)(1). The regulation, however, does not speak to, let alone resolve, the § 203(b)(1)(F) conflict at issue. It simply does not advance the ball. If anything, the regulation lends support to *Jones* and the Plan. That is because the regulation, similar to § 203(b)(1)(F), looks to the applicable rules of a plan to determine what service should be counted by the plan: "all service from the date of participation in the plan *as determined in accordance with applicable plan provisions*, shall be taken into account in determining an employee's period of service." 29 C.F.R. § 2530.204-2(b) (emphasis added). McClain's regulatory argument does not offer a compelling reason to overturn *Jones*.

Consequently, pursuant to our decision in *Jones* and § 203(b)(1)(F), the Plan is entitled to summary judgment

on McClain's § 204(b)(4)(D) claim.[4] Under the Plan's pre-ERISA framework, McClain's break in service precluded pension benefits for his time with National Tea, and ERISA does not alter that contractual arrangement. The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[4] In his opening appellate brief, McClain also preemptively raised a statute of limitations argument to which the Plan offered no response. As the Plan has abandoned this affirmative defense, it merits no further discussion here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THERON M. McCLAIN, Individually and On Behalf of All Others Similarly Situated, Plaintiff,	)	
vs.	)	1:03-CV-0403-SEB-VSS
RETAIL FOOD EMPLOYERS JOINT PENSION PLAN and BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN, Defendants.	)	

ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants, Retail Food Employers Joint Pension Plan ("the Plan") and Board of Trustees of Retail Food Employers Joint Pension Plan, moved to dismiss Plaintiff Theron M. McClain's ("McClain") claim that they denied him pension benefits in violation of section 204(b)(4)(A) of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(b)(4)(A). Because the parties present matters outside the pleadings, however, we convert Defendants' motion to one for summary, judgment under Rule 56. Fed.R.Civ.P. 12(b). For the reasons explained below, we *GRANT* Defendants' converted motion for summary judgment.

Factual Background

Plaintiff McClain was a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Defendant Plan during his employment with National Tea Company, from March 1957 to March 1973, and again during his employment with Grace Foods, from April 1984 to April 1993. Am. Compl. ¶¶ 5-6, 8-9. The Plan is a multi-employer pension fund within the meaning of ERISA § 3(37)(A), 29 U.S.C. § 1002(3)(37)(A). *Id.* ¶ 6. From March 1973 to April 1984, when McClain owned a retail food store, he did not participate in the Plan. *Id.* ¶ 10.

At the time McClain terminated his employment with Grace Foods in April 1993, he began receiving pension benefits from the Plan based on his service with Grace Foods, but not on his service with National Tea Company. *Id.* ¶ 11. In 2001, when McClain applied to the Plan for pension benefits based on his service with National Tea Company, he was denied. *Id.* ¶ 12.

The plan in effect at the time of McClain's application for benefits in 2001 was the version of the plan that had been amended and restated in 1994 ("the 1994 plan"). Day Aff. ¶ 4. The 1994 plan contains a break in service provision, section 4.4 entitled Periods Not Included in Calculating Eligibility Service, which provides:

> (a) *Break in Service Prior to January 1, 1976.* Prior to January 1, 1976, an Employee shall have a Break in Service if he fails to accumulate any Eligibility Service during any period of two consecutive calendar years prior to January 1, 1976, and immediately prior to the commencement of such two-year period he was not eligible for a pension benefit in accordance with the rules of the Plan as then in effect.—

. . .

(e) *Effect of Break in Service.* If an Employee has a Break in Service, all of his Eligibility Service accumulated prior to the Break in Service shall not be counted for purposes of determining his eligibility for a pension benefit.

(Day Aff. Ex. A, pp. IV-5, 6). These provisions of section 4.4 of the 1994 plan originally appeared in the version of the plan amended and restated on June 1, 1976 ("the 1976 plan") to conform with the requirements of ERISA. ERISA became effective on January 1, 1976, and applied to the Plan beginning on June 1, 1976, the first of day of the Plan's plan year. *See* 29 U.S.C. § 1061.

Under section 4.4, McClain, who left his employment at National Tea Company in March 1973, did not accumulate any eligibility service during the two consecutive calendar years prior to January 1, 1976. The plan in effect "immediately prior to the commencement of the two year period," i.e., the plan in effect on December 31, 1973, was also the plan in effect at the time McClain left his employment with National Tea Company in March 1973; that plan was dated June 1, 1966 ("the 1966 Plan"). *See* Day Aff. ¶ 5, Ex. B. The version of the 1966 plan in effect in 1973 had been amended on October 18, 1972, as follows:

5.8 *Vested Retirement.* An Employee shall be eligible for a Vested Pension if:

(a) his Employment is terminated on or after his fiftieth (50th) birthday;

(b) he has completed ten (10) or more years of Credited Service; and

(c) he has filed an application for a Pension.

This amendment became effective January 1, 1973. (Day Aff. Ex. C.)

At the time of McClain's break in service, although McClain had completed sixteen years of service, he was only thirty-three years old. (*See* Def.'s Ex. 5). Therefore, his benefits did not vest under the terms of the 1966 Plan as amended in 1973. Moreover, in the words of section 4.4, "he was not eligible for a pension benefit in accordance with the rules of the plan then in effect." As a result of this ineligibility, McClain experienced a Break in Service under section 4.4, which rendered worthless the benefits that McClain had accumulated before leaving the National Tea Company and the Plan in 1973.

On September 25, 2003, following our August 26, 2003 denial of McClain's motion for remand, McClain filed an amended complaint in this court alleging a violation of ERISA § 204(b)(4)(A), 29 U.S.C. § 1054(b)(4)(A), and seeking class action status. Because McClain asserts that the Plan denied him benefits, this case arises under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). In addition, venue is proper in this court as the Plan is administered in Indianapolis, Indiana, in the Southern District of Indiana. On November 4, 2003, Defendants moved to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(6). Because the parties introduced matters outside the pleadings, we convert Defendants' motion to a Rule 56 motion for summary judgment and rule as follows.

Legal Analysis

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether

there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. *See Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986); *Eiland v. Trinity Hosp.*, 150 F.3d 747, 750 (7th Cir. 1998).

On a motion for summary judgment, the burden rests on the moving party, Defendants in this case, to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the nonmovant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. *Id.* at 322-23. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994), *citing Matsushita*, 475 U.S. at 585-87; *Celotex*, 477 U.S. at 322-24; *Anderson*, 477 U.S. at 249-52.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldridge*, 24 F.3d at 290. Therefore, in considering a motion for summary judgment, we draw all reasonable

inferences in favor of the nonmovant. *Venters v. City of Delphi,* 123 F.3d 956, 962 (7th Cir. 1997). If genuine doubts remain, and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. *See Shields Enters. Inc. v. First Chicago Corp.,* 975 F.2d 1290, 1294 (7th Cir. 1992); *Wolf v. City of Fitchburg,* 870 F.2d 1327, 1330 (7th Cir. 1989). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish her case, summary judgment is not only appropriate, but mandated. *See Celotex,* 477 U.S. at 322; *Waldridge,* 24 F.3d at 920.

ERISA § 204(b)(4)(A)

Before we address the parties' specific arguments, we briefly describe the ERISA provisions at issue in this case. Under ERISA, breaks in service impact the related concepts of accrued and vested benefits. *Vallone v. CNA Fin. Corp.,* 2004 WL 1575177, *16 (7th Cir. July 15, 2004) (citing *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund,* 320 F.3d 151, 156 (2nd Cir. 2003)). "Accrued" benefits refer to those normal retirement benefits that an employee has earned at any given time during the course of employment. *Id.*; *see also* 29 U.S.C. § 1002(23)(A). "Vested" benefits, by contrast, refer to those normal retirement benefits to which an employee has a "nonforfeitable" claim; in other words, those accrued benefits he is entitled to keep. *Id.*; *see also* 29 U.S.C. § 1002(19).[1] An

[1] This subsection, 29 U.S.C. § 1002(19), states:

The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which

(Continued on following page)

employee becomes fully vested when he has a nonforfeitable right to his entire accrued benefit. An employee accrues benefits both before and after he becomes vested in a portion of his accrued benefit. *McDonald,* 320 F.3d at 156.

Although accrued and vested benefits are related, they are governed by two different code sections. ERISA § 203, 29 U.S.C. § 1053, determines the vesting of benefits whereas ERISA § 204, 29 U.S.C. § 1054, determines the accrual of benefits. In general with regard to vesting, section 203 requires the employer to count all of the employee's years of service, both before and after ERISA became effective. *Jones v. UOP,* 16 F.3d 141, 143 (7th Cir. 1994). An exception exists, however, for "years of service before [ERISA] first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." ERISA § 203(b)(1)(F); 29 U.S.C. § 1053(b)(1)(F); *Coleman v. Interco Inc. Divisions' Plans,* 933 F.2d 550, 551 (7th Cir. 1991). Applying ERISA § 203(b)(1)(F) to the facts before us, the benefits McClain accumulated during his employment at National Tea Company did not vest for purposes of ERISA. Section 4.4, the break-in-service provision, has been in effect since ERISA became applicable to the Plan on June 1, 1976. In McClain's case, section 4.4 includes by reference the vesting rules of the 1966 plan as amended in 1973. McClain was well short of his fiftieth birthday at the time of his break in service in 1973, and thus, his pre-break years of service did not vest. As a result of this non-vesting, McClain's pre-break years of

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is unconditional, and which is legally enforceable against the plan. . . .

service were disregarded under section 4.4, the plan rule regarding breaks in service in effect as of ERISA's applicable date.

With regard to the accrual of benefits, however, ERISA § 204 by reference to ERISA § 202, makes no mention of breaks in service.[2] It simply requires the

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[2] 2 ERISA § 204 (b)(1)(D) provides:

> Subparagraphs (A), (B), and (C) [anti-backloading tests] shall not apply with respect to years of participation before the first plan year to which [ERISA] applies, but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of –
>
> (i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or
>
> (ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

To determine "the accrued benefit of any participant," a plan must first establish the period of service forming the basis of that determination. ERISA § 204(b)(4)(A), the section McClain alleged Defendants violated, states that the relevant period of service "begin[s] at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under [§ 202(b)] . . . " Section 202(b), in turn, provides:

> Except as otherwise provided in paragraphs (2), (3), and (4), all years of service with the employer or employers maintaining the plan shall be taken into account in computing the period of service. . . .

The only relevant exception, paragraph (4) or the "rule of parity," does not credit years of service if "the number of consecutive 1-year breaks in service equals or exceeds the aggregate number of such years of service before such break." In this case, McClain incurred a ten year break in service, which was less than his sixteen years of service with National Tea Company. Therefore, the rule of parity does not apply to him.

employer, in determining the amount of benefits that the employee has accrued, to credit all the employee's years of service with the employer. *Jones,* 16 F.3d at 146. The Circuit Courts of Appeal are split as to whether the section 203 break-in-service provisions should be read into section 204. Rather than follow the law of the Seventh Circuit which treats vesting and accrual of benefits equally, *Jones,* 16 F.3d at 143, McClain invites us to adopt the statutory interpretation of the Second Circuit in *McDonald,* 320 F.3d at 156-59, and thus, to find that the ERISA § 203(b) break-in-service provisions should not be read into ERISA § 204, including § 204(b)(4)(A). We decline his invitation.

In *Jones,* the Seventh Circuit stated that, as a matter of "contract interpretation," the plaintiff was not entitled to credit for service prior to a break in service under the terms of the plan, which, like the Plan at issue in our case, incorporated certain provisions from pre-ERISA, predecessor plans. *Jones,* 16 F.3d at 142-43. The court then considered, as it had to, whether ERISA §§ 203 and 204, when read together, compelled a different result. Citing to Jeffrey D. Mamorsky, Employee Benefits Handbook § 18.16 (3d ed. 1992), the Seventh Circuit reasoned that section 204 was intended to prevent a plan from backloading benefits. Backloading, which occurs when benefits accrue very slowly until the employee is near retirement age, defeats the vesting provisions of section 203. (Although the employee's benefits would vest after ten years, for example, they would be worth very little.) In the Seventh Circuit's view, "it would be perilous to assume from the absence of an express reference to breaks in service that section 204(b)(1)(D) was intended to override them," because section 204(b)(1)(D) was intended to deal with the distinct problem of backloading. *Jones,* 16 F.3d at

143-44. "[Section 204] should be read together with section 203 to protect the employee against efforts to circumvent section 203's vesting rules, rather than to defeat break in service provisions in plans adopted before ERISA was." *Id.* at 144. Thus, the court concluded that the break-in-service provision at issue in the case was valid. Two other circuits have reached the same conclusion, but without analysis. *See Redmond v. Burlington N. R.R. Co. Pension Plan,* 821 F.2d 461 (8th Cir. 1987); *Jameson v. Bethlehem Steel Corp.,* 634 F. Supp. 688 (E.D. Pa. 1986), *aff'd without opinion,* 802 F.2d 447 (3d Cir. 1986).

McClain offers two bases for distinguishing *Jones,* neither of which is persuasive. First, McClain asserts that the plan participant in *Jones* sought to have his first period of service counted twice, and for this reason, the Seventh Circuit upheld the break-in-service provision of the plan at issue. However, any attempted "double-counting" is irrelevant to the question of whether the first, pre-ERISA period of service counts at all under a post-ERISA successor plan that excludes credit for years of service prior to a pre-ERISA break in service. Second, McClain contends that the Seventh Circuit's discussion of breaks-inservice in the context of ERISA §§ 203 and 204 was dicta, and therefore, has no precedential value. McClain's argument, however, is without merit. The Seventh Circuit's analysis of the purposes of and the interplay between ERISA §§ 203 and 204 were essential to its decision. *See McDonald,* 320 F.3d at 159 ("we respectfully decline to join the Seventh Circuit's refusal 'to treat vesting and accrual of benefits differently with respect to breaks in service.' "); *see also First Midwest Bancorp, Inc. v. Hickey,* 1994 WL 280080, *5 (N.D. Ill. 1994) (stating that the Seventh Circuit reached the result in *Jones* "by

importing the vesting rules regarding breaks in service to the benefit accrual section"), *Hoover v. Bank of Am. Corp.*, 286 F. Supp. 2d 1326 (M.D. Fla. 2003).

In this case, on the basis of section 4.4, the break-in-service provision in effect on the date ERISA became applicable to the Plan as well as on the date McClain applied for benefits, Defendants excluded McClain's years of service with National Tea Company from the calculation of pension benefits. This treatment of pre-ERISA breaks in service comports with ERISA § 203(b)(I)(F), the exception to the requirement that the employer count all of the employee's years of service for vesting purposes. Because, under *Jones,* the vesting and accrual of benefits are treated equally, Defendants did not violate ERISA § 204(b)(4)(A) when they denied McClain benefits stemming from his pre-break-inservice employment at National Tea Company. Accordingly, we *GRANT* Defendants' Motion for Summary Judgment.[3]

Conclusion

For the reasons explicated above, we find that Defendants did not violate ERISA § 204(b)(4)(A). Accordingly, we *GRANT* Defendants' Motion for Summary Judgment.

It is so ORDERED this 9th day of August 2004.

/s/ Sara Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

[3] Because we find no violation of ERISA § 204(b)(4)(A), we do not reach Defendants' arguments based on statutes of limitation.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THERON M. McCLAIN, Individually and On Behalf of All Others Similarly Situated, Plaintiff,	)	
vs.	)	
RETAIL FOOD EMPLOYERS JOINT PENSION PLAN and BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN, Defendants.	)	1:03-CV-0403-SEB-VSS

JUDGMENT

The court, having this day made its Entry, and having directed the entry of final judgment.

IT IS ADJUDGED AND DECREED that the Defendants' converted motion for summary judgment is **GRANTED** and that judgment is entered for the Defendants, Retail Food Employers Joint Pension Plan and Board of Trustees of Retail Food Employers Joint Pension Plan, and against the Plaintiff, Theron M. McClain, on his amended complaint.

Each party to bear its own costs.

It is so ORDERED this 9th day of August 2004.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

29 U.S.C. § 1052 (1974 Version). Minimum participation standards

(a)(1)(A) No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates –

(i) the date on which the employee attains the age of 25; or

(ii) the date on which he completes 1 year of service.

(B)(i) In the case of any plan which provides that after not more than 3 years of service each participant has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (ii) of subparagraph (A) shall be applied by substituting "3 years of service" for "1 year of service".

(ii) In the case of any plan maintained exclusively for employees of an educational institution (as defined in section 170(b)(1)(A)(ii) of Title 26) by an employer which is exempt from tax under section 501(a) of Title 26, which provides that each participant having at least 1 year of service has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (i) of subparagraph (A) shall be applied by substituting "30" for "25". This clause shall not apply to any plan to which clause (i) applies.

(2) No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age, unless –

(A) the plan is a –

(i) defined benefit plan, or

(ii) target benefit plan (as defined under regulations prescribed by the Secretary of the Treasury), and

(B) such employees begin employment with the employer after they have attained a specified age which is not more than 5 years before the normal retirement age under the plan.

(3)(A) For purposes of this section, the term "year of service" means a 12-month period during which the employee has not less than 1,000 hours of service. For purposes of this paragraph, computation of any 12-month period shall be made with reference to the date on which the employee's employment commenced, except that, in accordance with regulations prescribed by the Secretary, such computation may be made by reference to the first day of a plan year in the case of an employee who does not complete 1,000 hours of service during the 12-month period beginning on the date his employment commenced.

(B) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as may be determined under regulations prescribed by the Secretary.

(C) For purposes of this section, the term "hour of service" means a time of service determined under regulations prescribed by the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as

1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(4) A plan shall be treated as not meeting the requirements of paragraph (1) unless it provides that any employee who has satisfied the minimum age and service requirements specified in such paragraph, and who is otherwise entitled to participate in the plan, commences participation in the plan no later than the earlier of –

(A) the first day of the first plan year beginning after the date on which such employee satisfied such requirements, or

(B) the date 6 months after the date on which he satisfied such requirements,

unless such employee was separated from the service before the date referred to in subparagraph (A) or (B), whichever is applicable.

(b)(1) Except as otherwise provided in paragraphs (2), (3), and (4), all years of service with the employer or employers maintaining the plan shall be taken into account in computing the period of service for purposes of subsection (a)(1) of this section.

(2) In the case of any employee who has any 1-year break in service (as defined in section 1053(b)(3)(A) of this title) under the plan to which the service requirements of clause (i) of subsection (a)(1)(B) of this section apply, if such employee has not satisfied such requirements, service before such break shall not be required to be taken into account.

(3) In computing an employee's period of service for purposes of subsection (a)(1) of this section in the case of

any participant who has any 1-year break in service (as defined in section 1053(b)(3)(A) of this title), service before such break shall not be required to be taken into account under the plan until he has completed a year of service (as defined in subsection (a)(3) of this section) after his return.

(4) In the case of an employee who does not have any nonforfeitable right to an accrued benefit derived from employer contributions, years of service with the employer or employers maintaining the plan before a break in service shall not be required to be taken into account in computing the period of service for purposes of subsection (a)(1) of this section if the number of consecutive 1-year breaks in service equals or exceeds the aggregate number of such years of service before such break. Such aggregate number of years of service before such break shall be deemed not to include any years of service not required to be taken into account under this paragraph by reason of any prior break in service.

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29 U.S.C. § 1053 (1974 Version). Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right

to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed –	and sum of age and service equals or exceeds –	then the nonforfeitable percentage is –
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits –

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a non forfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest.

Such interest, shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) **Cross Reference.–**

For nonforfeitably[1] where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 22, except that in the case of a plan which does not satisfy subparagraph (A) or (B) of subsection (a)(2) of this section, the plan may not disregard any such year of service during which the employee was a participant;

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions,

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970; and

(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date.

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during

which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 1052(a)(3)(C) of this title.

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(3)(A) For purposes of this paragraph, the term "1-year break in service" means a calendar year, plan year, or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has not completed more than 500 hours of service.

(B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return,

(C) For purposes of paragraph (1), in the case of any participant in an individual account plan or an insured defined benefit plan which satisfies the requirements of subsection 1054(b)(1)(F) of this title who has any 1-year break in service, years of service after such break shall not

be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such break.

(D) For purposes of paragraph (1), in the case of a participant who, under the plan, does not have any nonforfeitable right to an accrued benefit derived from employer contributions, years of service before any 1-year break in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service equals or exceeds the aggregate number of such years of service prior to such break. Such aggregate number of years of service before such break shall he deemed not to include any years of service not required to be taken into account under this subparagraph by reason of any prior break in service.

(4) Cross references. –

(A) For definitions of "accrued benefit" and "normal retirement age", see sections 1002(23) and (24) of this title.

(B) For effect of certain cash out distributions, see section 1054(d)(1) of this title.

(c)(1)(A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) of this section shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of Title 26.

(3) The requirements of subsection (a)(2) of this section shall be deemed to be satisfied in the case of a class year plan if such plan provides that 100 percent of each employee's right to or derived from the contributions of the employer on his behalf with respect to any plan year are nonforfeitable not later than the end of the 5th plan year following the plan year for which such contributions were made. For purposes of this part, the term "class year plan" means a profit sharing, stock bonus, or money purchase plan which provides for the separate nonforfeitability of employees' rights to or derived from the contributions for each plan year.

(d) A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part.

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29 U.S.C. § 1054 (1974 Version). Benefit accrual requirements

Satisfaction of requirements by pension plans

(a) Each pension plan shall satisfy the requirements of subsection (b)(2) of this section, and in the case of a defined benefit plan shall also satisfy the requirements of subsection (b)(1) of this section.

Enumeration of plan requirements

(b)(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than –

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33⅓) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133⅓ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph –

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would he entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which

his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of –

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not

satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "years of service" has the meaning provided by section 1052(a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan –

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081(b) of this title (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081(b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act which benefits under the plan –

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(2) A plan satisfies the requirements of this paragraph if –

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

(3)(A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 1052(b) of this title) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

(B) For purposes of this paragraph, except as provided in sub-paragraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary)

the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis merely because such service is not taken into account.

(D) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall he such period as determined under regulations prescribed by the Secretary.

(E) For purposes of this subsection in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

Employee's accrued benefits derived from employer and employee contributions

(c)(1) For purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is –

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his

total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B)(i) In the case of a defined benefit plan providing an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the accrued benefit derived from contributions made by an employee as of any applicable date is the annual benefit equal to the employee's accumulated contributions multiplied by the appropriate conversion factor.

(ii) For purposes of clause (i), the term "appropriate conversion factor" means the factor necessary to convert an amount equal to the accumulated contributions to a single life annuity (without ancillary benefits) commencing at normal retirement age and shall be 10 percent for a normal retirement age of 65 years. For other normal retirement ages the conversion factor shall be determined in accordance with regulations prescribed by the Secretary of the Treasury or his delegate.

(C) For purposes of this subsection, the term "accumulated contributions" means the total of –

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053(a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually at the rate of 5 percent per annum from the beginning

of the first plan year to which section 1053(a)(2) of this title applies (by reason of the applicable effective date) to the date upon which the employee would attain normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury is authorized to adjust by regulation the conversion factor described in subparagraph (B), the rate of interest described in clause (iii) of subparagraph (C), or both, from time to time as he may deem necessary. The rate of interest shall bear the relationship to 5 percent which the Secretary of the Treasury determines to be comparable to the relationship which the long-term money rates and investment yields for the last period of 10 calendar years ending at least 12 months before the beginning of the plan year bear to the long-term money rates and investment yields for the 10-calendar year period 1964 through 1973. No such adjustment shall be effective for a plan year beginning before the expiration of 1 year after such adjustment is determined and published.

(E) The accrued benefit derived from employee contributions shall not exceed the greater of –

(i) the employee's accrued benefit under the plan, or

(ii) the accrued benefit derived from employee contributions determined as though the amounts calculated under clauses (ii) and (iii) of subparagraph (C) were zero.

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

Employee service which may be disregarded in determining employee's accrued benefits under plan

(d) Notwithstanding section 1053(b)(1) of this title, for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received –

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in

an amount (not more than $1,750) permitted under regulations prescribed by the Secretary of the Treasury, or

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. Paragraph (2) shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

Opportunity to repay full amount of distributions which have been reduced through disregarded employee service

(e) For purposes of determining the employee's accrued benefit, the plan shall not disregard service as provided in subsection (d) of this section unless the plan provides an opportunity for the participant to repay the full amount of a distribution described in subsection (d) of this section with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into account service so disregarded. This subsection shall apply only in the case of a participant who –

(1) received such a distribution in any plan year to which this section applies, which distribution was less than the present value of his accrued benefit,

(2) resumes employment covered under the plan, and

(3) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section.

In the case of a defined contribution plan, the plan provision required under this subsection may provide that such repayment must be made before the participant has any 1-year break in service commencing after such withdrawal.

Employer treated as maintaining plan

(f) For the purposes of this part, an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

Decrease of accrued benefits through amendment of plan

(g) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

(h) **Cross reference. –**

For special rules relating to class year plans and plan provisions adopted to preclude discrimination, see sections 1053(c)(2) and (3) of this title.

29 U.S.C.A. § 1054 (Current Version)

(b) Enumeration of plan requirements

(1)(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of –

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

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29 C.F.R. § 2530.204-2

Accrual computation period.

(b) Participation prior to effective date. For purposes of applying the accrual rules of section 204(b)(1)(D) of the Act and section 411(b)(1)(D) of the Code (relating to accrual requirements for defined benefit plans for periods prior to the effective date of those sections), all service from the date of participation in the plan as determined in accordance with applicable plan provisions, shall be taken into account in determining an employee's period of service. When the plan documents do not provide a definite means for determining the date of commencement of participation, the date of commencement of employment covered under the plan during the period that the employer

maintained the plan shall be presumed to be the date of commencement of participation in the plan. The plan may rebut this presumption by demonstrating from circumstances surrounding the operation of the plan, such as the date of commencement of mandatory employee contributions, that participation actually began on a later date.

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26 CFR § 1.411(b)-1

(c) Accruals for service before effective date – (1) General rule. For a plan year to which section 411 applies, a defined benefit plan does not satisfy the requirements of section 411(b)(1) and this section unless, under the plan, the accrued benefit of each participant for plan years beginning before section 411 applies is not less than the greater of –

(i) Such participant's accrued benefit (as of the day before section 411 applies) determined under the plan as in effect from time to time prior to September 2, 1974 (without regard to any amendment adopted after such date), or

(ii) One-half of the accrued benefit that would be determined with respect to the participant as of the day before section 411 applies if the participant's accrued benefit were computed for such prior plan years under a method which satisfies the requirements of section 411(b)(1)(A), (B), or (C) and paragraph (b)(1), (2), or (3) of this section. See 29 CFR Part 2530, Department of Labor regulations relating to minimum standards for employee pension benefit plans, for time participation deemed to begin.

U.S. Department of Justice

[LOGO]

United States Attorney
Southern District of New York

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February 14, 2001

By Hand to Chambers

Hon. Naomi Reice Buchwald
United States District Judge
United States Courthouse
500 Pearl Street, Room 2270
New York, New York 10007

Re: McDonald v. Pension Plan of the NYSA-ILA, 99 Civ. 9054 (NRB)

Dear Judge Buchwald:

We write in response to the Court's letter, dated December 13, 2000, inviting the Government to express its views in connection with the following issue arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"): whether an employer applying a pre-ERISA defined benefit plan is entitled, after the enactment of ERISA, to apply pre-ERISA break-in-service rules in calculating benefit accrual.

This letter conveys the views of the Office of Chief Counsel of the Internal Revenue Service (the "IRS"), which is vested with interpretive authority over the regulations relevant to the issue framed by the Court. The IRS has not considered the merits of the summary judgment motions now pending before the Court and expresses no view as to the merits of this particular action. Instead, the IRS

supplies this information to the Court as general guidance to assist the Court in its interpretation of ERISA's benefit-accrual provisions.

It is the IRS's position that all years of service should be taken into account to determine an employee's accrued benefit, including years of service both before and after ERISA's effective date of September 2, 1974, except for years of service specifically mentioned in Section 410(a)(5) and Section 411(b)(4)(A) of the Internal Revenue Code (the "IRC"). 26 U.S.C. §§ 410(a)(5), 411(b)(4)(A).* This position is based, in part, on the fact that Section 410(a)(5)(A) provides that "*all years of service* . . . shall be taken into account" without differentiating between an employee's pre- and post-ERISA years of service. *Id.* § 410(a)(5)(A) (emphasis supplied). Thus, unless an employee's pre-ERISA years of service can be disregarded under the specific break-in-service rules set forth in Section 410(a)(5)(B-D), such pre-ERISA service must be taken into account for the purpose of determining that employee's accrued benefit under the benefits plan in question.**

ERISA and the IRC also specify the manner in which an employee's pre-ERISA years of service should be taken into account. *See generally* 26 U.S.C. § 411(b)(1)(D); 29 U.S.C. § 204(b)(1)(D); 26 C.F.R. § 1.411(b)-1(c)(1). According

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* Unless otherwise specified, all statutory citations in this letter are to the IRC.

** For example, pursuant to Section 410(a)(5)(C), an employer may disregard years of service before a one year break in service until an employee has returned and completed a year of service after the break in service. The other cases where a participant's years of service may be disregarded for accrual purposes are set forth in Section 410(a)(5)(B) and (D).

to the applicable regulations, generally speaking, the accrual rules of Section 411(b)(1) are not satisfied unless, under the benefits plan in question, the accrued benefit of each participant in the plan with respect to pre-ERISA years of service is not less than the greater of:

i. such participant's accrued benefit (as of the day before Section 411 applies) determined under the plan as in effect from time to time prior to September 2, 1974 (without regard to any amendment adopted after such date); or

ii. one-half of the accrued benefit that would be determined with respect to the participant as of the day before Section 411 applies if the participant's accrued benefit were computed for such prior plan years under a method which satisfies the requirements of Section 411(b)(1)(A), (B) or (C) and paragraphs (b)(1), (2) or (3) of 26 C.F.R. § 1.411(b)-1(c)(1).

See 26 U.S.C. § 411(b)(1)(D); 26 C.F.R. § 1.411(b)-1(c)(1). In other words, with respect to the accrual of benefits for pre-ERISA years of service, a plan participant is entitled to the *greater of* his accrued benefit under the pre-ERISA plan provisions or one-half of the benefit that the participant would have been entitled to under ERISA's minimum accrual standards.

Finally, in response to the Court's query, the IRS is not aware of any statutory provisions or regulations that are relevant to this issue aside from those identified in the Court's December 13, 2000 letter.

We hope that this letter is of assistance to the Court in this matter.

Respectfully,

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No. 05-390

In The Supreme Court of the United States

THERON M. McCLAIN,

Petitioner,

v.

RETAIL FOOD EMPLOYERS JOINT PENSION PLAN and BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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QUESTION PRESENTED

Should the ERISA rule of parity be retroactively applied to compel a pension plan to credit a retiree's pre-ERISA service which did not lead to vested benefits under the plan's pre-ERISA break in service rule due to the retiree's pre-ERISA cessation of covered employment?

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STATEMENT OF THE CASE

Respondent, Indiana Area United Food and Commercial Workers Union Locals and Retail Food Employers Joint Pension Plan, denied part of a request for pension benefits by Petitioner, Theron M. McClain, following his retirement from Grace Foods in 2001. Petitioner was employed by National Tea Company, a covered employer, from March 1957 until March 1973. He left covered employment in March 1973 and did not resume employment by a covered employer until April 1984 when he commenced employment by Grace Foods. Upon Petitioner's retirement from Grace Foods he sought pension benefits for both periods of covered employment. He was granted a pension based on his post-ERISA service commencing in 1984 but was denied credit for the service which occurred between 1957 and 1973.

In determining that Petitioner did not have credited service for the period of his employment by National Tea Company, plan personnel reviewed the plan provisions in effect in 2001 at the time of Petitioner's retirement from Grace Foods, the break in service and vesting rules in effect at the time Petitioner left National Tea Company which had been adopted by the trustees as an amendment to the 1966 Plan, and Petitioner's work history which included an 11-year period of no service. According to the rules applicable prior to the enactment of ERISA, Petitioner incurred a break in service. In addition, Petitioner's pension benefits did not vest because under the vesting rules in effect upon his departure from National Tea Company, he left employment before age 50.

Affirming the United States District Court for the Southern District of Indiana, the United States Court of

Appeals for the Seventh Circuit in this case upheld its precedent in *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994). The Court explained that ERISA Section 203(b)(1)(F), 29 U.S.C. §1053(b)(1)(F), provides an exception for pre-ERISA breaks in service, and thereby allows a plan to disregard years of service before ERISA became applicable to the plan "if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." 29 U.S.C. §1053(b)(1)(F). Accordingly, the Court read ERISA Section 204, 29 U.S.C. §1054, which governs accrual, in conjunction with ERISA Section 203, 29 U.S.C. §1053, which governs vesting, so as not to override the explicit pre-ERISA break in service rule in Section 203, 29 U.S.C. §1053.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE OPINION BELOW IS WELL-REASONED AND COMPORTS WITH ERISA

Petitioner erroneously argued below that he was entitled to credit for all of his years of service despite a pre-ERISA break in service. The accrual rules of ERISA, however, were not intended to override pre-ERISA break in service rules. The United States Court of Appeals for the Seventh Circuit correctly applied Section 203(b)(1)(F), 29 U.S.C. §1053(b)(1)(F), allowing the Plan to disregard a pre-ERISA period of service. Essentially, the United States Court of Appeals was correct because the issue in this case turns on the vesting rule in Section 203, 29 U.S.C. §1053, and not the accrual rules governed by Section 204, 29 U.S.C. §1054.

Petitioner's position would confer a benefit upon him and a cost to Respondent Plan which neither party had any reason to expect, when based on the existing contemporaneous pre-ERISA rules they made their plans concerning what benefits were due to Petitioner as a result of his work. Absent a clear Congressional mandate, the courts are instructed to refrain from retroactive application of a statutory section in a way that defeats pre-established legitimate expectations. *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994).

As support for his position Petitioner has also sought to rely upon a letter of Mary Jo White, a United States Attorney, purporting to convey the views of the Office of Chief Counsel of the Internal Revenue Service, to the effect that all years of service should be taken into account in determining an employee's accrued benefit, including years of service before ERISA's effective date. Petitioner's reliance upon an opinion letter is inapposite. Interpretations such as those in opinion letters lack the force of law and do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587, 146 L.Ed.2d 621, 120 S.Ct. 1655 (2000).

If anything, a Labor Department regulation, 29 C.F.R. §2530.204-2(b), which was relied upon by Petitioner below, is persuasive. This regulation provides that "all service from the date of participation in the plan *as determined in accordance with applicable plan provisions*, shall be taken into account in determining an employee's period of service." This is exactly what Respondent Plan did here. Thus, as observed by the United States Court of Appeals for the Seventh Circuit, the regulation looks to the applicable rules of a plan to determine what pre-ERISA service

should be counted by the plan. *McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582, 587 (7th Cir. 2005) (quoting 29 C.F.R. §2530.204-2(b)).

II. PETITIONER'S CONTENTION THAT COUNTLESS NUMBERS ARE AFFECTED BY PRE-ERISA BREAK IN SERVICE RULES IS COMPLETELY UNSUBSTANTIATED AND OUTSIDE THE RECORD

In his Statement of the Case, Petitioner improperly relies on unfounded assumptions and upon matter outside the record in assessing the impact of this case. Petitioner suggests that "[p]re-ERISA plans provided for a loss of all credited service, regardless of its length, after a break in service as short as one year or less. Thus, countless workers in the construction and other cyclical industries are vitally affected, as well as countless women whose early service was broken for child-birth or child-rearing, but who returned to covered employment post-ERISA." Petition at 3. Petitioner goes on to suggest that the issue presented is not a "historical curiosity" but recurs and will continue to recur. Petitioner's suggestion is completely unsubstantiated and has no foundation in the record here. Indeed, reliance upon facts outside the record has consistently been condemned by this Court. R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 650 (8th ed. 2002).

Significantly, Petitioner has presented no evidence as to the numbers of individuals who might be affected by a pre-ERISA break in service rule unfavorable to plan participants – whether participants in Respondents' plan or in any other plan. Instead, Petitioner points to four cases in his petition, and by implication to four other

plaintiffs in other cases involving pre-ERISA break in service rules – hardly a large number given the fact that ERISA has now been in place for three decades. *See DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220 (3rd Cir. 2005); *Hoover v. Bank of America Corp.*, 286 F.Supp.2d 1326 (M.D. Fla. 2003), *aff'd*, 2005 U.S. App. LEXIS 8003 (11th Cir., Jan. 5, 2005); *McDonald v. NYSA-ILA Pension Plan*, 320 F.3d 151 (2d Cir. 2003); *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994). In sum, the suggestion that countless numbers are affected by the issue presented herein is supposition at best. In fact, common sense might lead to the opposite conclusion given the unlikely sequence of events that led to this case: specifically, (1) substantial pre-ERISA service; (2) a long break in service commencing before ERISA went into effect; and (3) a return to service thereafter sufficient to cause vesting under the post-ERISA rule for the post-ERISA period of covered service. As a consequence, this case does not present a question of exceptional importance which should be decided by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-390

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THERON M. McCLAIN,

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RETAIL FOOD EMPLOYERS JOINT PENSION PLAN AND BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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A. STATEMENT OF THE CASE

Congress Did And Intended To Treat Service Differently For Accrual And Vesting Purposes

Respondents rely on ERISA Section 203(b)(1)(F), 29 USC § 1053(b)(1)(F), which allows a plan to disregard *for vesting purposes* "(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." ERISA's minimum accrual and vesting provisions, however, are *not* interchangeable: the former govern service used to compute the amount of the "accrued benefit," while the latter determines "the nonforfeitable percentage" of the accrued benefit. Indeed, a review of ERISA's vesting and accrual provisions compels the conclusion that Congress not only did, but intended to treat service differently for vesting than for accrual purposes.

For *accrual* purposes, the only service taken into account is service rendered since participation began, so that creditable service is based on an employee's "years of participation" in the plan. Section 204(b)(4), 29 USC § 1054(b)(4), and 29 CFR § 2530.210(a)(2) ("Section 204(b) of the Act and 411(b) of the Code require only that periods of actual participation in the plan (e.g., covered service) be taken into account for purposes of benefit accrual").

By contrast, for *vesting* purposes the number of years of participation is irrelevant. In fact, *vesting* is based on "years of service," Section 203(a)(2), 29 USC 1053(a)(2), and Section 203(b)(1), 29 USC § 1053(b)(1), requires that "all of an employee's years of service with the employer or employer maintaining the plan shall be taken into account," with certain exceptions, *regardless of when*

participation began. See also 29 CFR § 2530.210(a)(1). Similarly, for vesting purposes, but not for accrual purposes, both "covered service" and "contiguous noncovered service" with an employer or employers maintaining the plan "shall be taken into account." 29 CFR § 2530.210(c)(1).

Furthermore, a "year of service" for *vesting* purposes is defined, in pertinent part, as 1,000 hours of service. Section 203(b)(2)(A), 29 USC § 1053(b)(2)(A). A "year of participation" for *accrual* purposes, on the other hand, is not defined, by ERISA, but must be set by the plan sponsor, based on "customary" full-time employment, with the proviso that a partial year of participation must be prorated for accrual purposes. If an employee's service, however, amounts to less than 1,000 hours in a plan year, it can be disregarded. ERISA Sections 204(b)(4)(B), (C), (D) and (E), 29 USC § 1054(b)(4)(B), (C), (D), and (E).

Finally, ERISA as effective in 1976 permitted a plan to deny participation (and, therefore, service credit for accrual purposes) to employees younger than age 25 and, under certain circumstances, age 30. ERISA Sections 202(a)(1)(A)(i) (1976) and 202(a)(1)(B)(ii) (1976), 29 USC §§ 1052(a)(1)(A)(i) (1976) and 1052(a)(1)(B)(ii) (1976), respectively. By contrast, for vesting purposes, ERISA Section 203(b)(1)(A) (1976), 29 USC § 1053(b)(1)(A) (1976), permitted plans to disregard only years of service before age 22, but under certain circumstances, required that *all* years of service, without regard to age, be credited for vesting purposes.[1]

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[1] Section 203(b)(1)(A) (1976), 29 USC § 1053(b)(1)(A) (1976), permitted a plan to disregard for vesting purposes only service before age 22. It also contained a special provision for a plan whose vesting

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In sum, it is undeniable that Congress not only treated service for accrual purposes differently from service for vesting purposes, but intended to do so. Indeed, had Congress intended to treat them the same way, it would have used the same terms for both (rather than "years of participation" for accrual and "years of service" for vesting), would have credited service equally for accrual and vesting, and would have cross-referenced Section 204(b)(4) to Section 203(b)(1), rather than to Section 202(b).

There is no principled way to engraft into the "period of service" used for accrual purposes the exception contained in subsection (F) of Section 203(b)(1) (service disregarded under the terms of the pre-ERISA plan), without also engrafting all the other exceptions contained in that Section. Yet, some of those exceptions, e.g., those relating to age and service, are incompatible with one another.

The different treatment of pre-ERISA breaks-in-service for accrual and vesting purposes has been noted by learned commentators. *See* Stephen R. Bruce, *Pension Claims: Rights and Obligations*, BNA, 2d Ed 1993, p. 147.

> In counting years of service for vesting, ERISA expressly permits pre-ERISA break-in-service rules to continue in force if the break in service occurred under a plan's terms before [ERISA's effective date]. However, no similar exception is

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provisions did not comply with either the 10-year cliff vesting schedule or the 15-year gradual vesting schedule, but only with the rule-of-45 (50% vesting when the sum of age and service equals 45%, 100% when it adds up to 55). Such a plan could not disregard years of service before age 22, if the employee was a plan participant.

> made in the rules for counting years of participation for benefit accruals. Rather, ERISA Section 204(b)(4)(A) [formerly 204(b)(3)(A)] provides that years of participation must include all years that are required to count under ERISA Section 202(b). This section in turn only permits a plan to disregard those years of service that may be canceled under the ERISA rule of parity.

Engrafting some of the rules governing vesting into the accrual rules would be analogous to the "'blue pencil' method of statutory interpretation," which "omit[s] all words not part of the clauses deemed pertinent to the task at hand [and] impermissibly ignores the relevant context in which statutory language subsists." *Massachusetts Mut Life v Russell*, 473 US 134, 142, 87 LEd2d 96, 105 SCt 3085 (1985).

Respondents argue that a regulation issued by the U.S. Department of Labor, 29 CFR § 2530.204-2(b), "is persuasive" in demonstrating that the period of pre-ERISA plan participation creditable for accrual purposes is governed by the terms of the pre-ERISA plan. According to Respondents, "[t]his regulation provides that 'all service from the date of participation in the plan *as determined in accordance with applicable plan provisions, shall be taken into account in determining an employee's period of service.*'" At 3 (italics in the original). In fact, that Regulation, as its title indicates ("Accrual computation period"), does not govern the pre-ERISA service that must be credited. Rather, it governs the 12-consecutive month period to be used in crediting pre-ERISA service.

The Regulation that governs what service must be credited is 29 CFR § 2530.204-1 ("Year of participation for benefit accrual") and, quite significantly, contains no

special provision for pre-ERISA service. Instead, it tracks the provisions of ERISA Section 204(b)(4), providing at 29 CFR § 2530.204-1(b)(1) in pertinent part: "In calculating an employee's period of service for purposes of benefit accrual under a defined benefit pension plan, section 204(b)(3) of the Act and section 411(b)(3) of the Code permit the following service to be disregarded: service before an employee *first becomes a participant in the plan* . . . " (Emphasis added)

The reference to "first" becoming a participant in the plan is an interpretation of ERISA Section 204(b)(4) (formerly 204(b)(3)), which requires the crediting of service commencing with "the earliest date on which the employee is a participant in the plan." The words "first" and "earliest" indicate that a participant may have several commencement of participation dates, each one following a break in service, but that only the "first" and "earliest" is taken into account for accrual purposes. The Second Circuit in *McDonald v NYSA-ILA Pension Plan*, noted as much: "This combination of "the earliest date" and "all years of service"[2] on its face does not allow for any break in a participating employee's service to negate previously accrued benefits," except for the "rule of parity" 320 F3d 151, 157, note 4 (2d Cir 2003).[3]

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[2] As noted in *McDonald*, Section 202(b)(1) *requires* the crediting of "all years of service with the employer or employers maintaining the plan." 320 F3d at 157.

[3] Even assuming, *arguendo*, that there was any ambiguity in 29 CFR § 2530.204-1(b)(1), enforcement and interpretation of ERISA's minimum standards, including minimum vesting and accrual standards, were transferred to the Secretary of the Treasury by the ERISA Reorganization Plan No. 4 of 1978. In response to the District Court's request, the Office of Chief Counsel of the Internal Revenue Service

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B. REASONS FOR GRANTING THE WRIT

According to Respondents, "the suggestion that countless numbers are affected by the issue presented herein is supposition at best. In fact, common sense might lead to the opposite conclusion given the unlikely sequence of events that led to this case . . . " At 5. It is true, of course, as stated by Voltaire with tongue firmly planted in cheek, that "common sense" appears to be the best-distributed of virtues, because no one complains of a lack of it. "Common sense," however, leads here to the opposite of the conclusion advocated by Respondents.

Respondents conclude that the only evidence as to the numbers of individuals who might be affected by a pre-ERISA break in service rule are the plaintiffs in the four cases cited in the Petition, "hardly a large number given the fact that ERISA has now been in place for three decades." At 4-5. In fact, however, Respondents themselves in their Brief before the Seventh Circuit relied on a number of additional decisions on the issue presented in this Petition, namely, *Tanzillo v Local Union 617*, 769 F2d 140 (3rd Cir 1985); *Haas and Cass v The Boeing Co*, 1992 US Dist LEXIS 13240 (ED Pa 1992), *aff'd without opinion*,

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confirmed that all pre-ERISA years of service should be taken into account for accrual purposes, unless lost due to ERISA's "rule of parity." (App 49) While IRS opinion letters are not entitled to *Chevron* deference, they are "entitled to respect," albeit "only to the extent that they have the power to persuade." Indeed, "[f]or a court to attempt to answer these questions [regarding ERISA's minimum accrual standards] without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" *Mead Corp v Tilley*, 490 US 714, 726, 109 SCt 2156, 104 LEd2d 796 (1989), quoting from *Ford Motor Credit Co v Milhollin*, 444 US 555, 568, 100 SCt 790, 798, 63 LEd2d 22 (1980).

993 F2d 877 (3rd Cir 1993); *Childs v Laborers' District Council Constr Industry Pension Fund*, 2003 US Dist LEXIS 15675 (ED Pa 2003); *Jameson v Bethlehem Steel Corp*, 634 FSupp 688 (ED Pa 1986); and *Redmond v Burlington Northern RR Pension Plan*, 821 F2d 461 (8th Cir 1987). These five decisions are in addition to *Jones v UOP*, 16 F3d 141 (7th Cir 1994); *McClain v Retail Food Employers Joint Pension Plan*, 413 F3d 582 (7th Cir 2005); *McDonald v NYSA-ILA Pension Plan*, 320 F3d 151 (2d Cir 2003); *DiGiacomo v Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F3d 220 (3rd Cir 2005); *Hoover v Bank of America Corp*, 286 FSupp2d 1326 (MD Fla 2003), *aff'd*, 2005 US App LEXIS 8003 (11th Cir Jan 5, 2005). These ten decisions, some brought on a class basis and many quite recent, cannot but lead to a "common sense" conclusion that the issue presented for review occurs quite often, attest to its continued importance, and are more than sufficient to justify granting the Writ.

Furthermore, regardless of the number of officially and unofficially reported decisions, the fact remains that pension plans that cover participants in more than one federal Circuit should not be subject to conflicting interpretations of ERISA, and that the pension rights of participants working under the same plan should not depend on the law of the particular Circuit in which the action is brought or litigated.[4] Although Petitioner discussed and

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[4] For an example of [illegible]n a case where the issue arose in the context of a motion for a change of venue, *see Wausau Benefits v Liming*, ___ FSupp2d ___, 2005 WL 2333689 (WD Wis, Sept 23, 2005). In *Liming* the plaintiff, an insurance company, sought to enforce a subrogation agreement against a plan participant, and resisted a change of venue motion on the grounds that a change of venue would be outcome-determinative, because of the different approaches to subrogation by the

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relied upon this argument as justifying the issuance of the Writ, Respondents did not address it in their Brief in Opposition, thereby evidencing their inability to dispute it.

Respectfully submitted,

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Ninth and Seventh Circuits. The Court granted the change of venue motion, however, holding that, "[u]nlike state law, federal law does not provide a choice of law analysis that might enable a court to make a principled decision between the law favoring the plaintiff and that favoring the defendant. . . . It is better to proceed on the presumption that in a unitary system, any court within the system would reach the same result in a federal question case." At *4. Such presumption would be entirely fictitious if this Court did not settle the law of the land, thereby creating a unitary system in fact, not only in theory.